No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT GOOGLE LLC

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QUESTION PRESENTED

Whether the district court acted within its discretion in approving the parties' *cy pres* settlement as "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), where both lower courts found that (1) the concededly adequate settlement fund could not feasibly be distributed to the unknown individual class members, (2) the recipients of *cy pres* funds were established institutions that committed to use the funds to benefit class members by addressing issues similar to those raised in the complaint, and (3) the recipients were independent of the parties and their counsel.

RULE 29.6 STATEMENT

Respondent Google LLC is a wholly owned subsidiary of XXVI Holdings Inc., which is a wholly owned subsidiary of Alphabet Inc., a publicly traded company. No publicly held corporation owns more than 10% of Alphabet Inc.'s stock.

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INTRODUCTION

Petitioners ask the Court to impose a bright-line ban on *cy pres* settlements—and overturn the settlement here—based principally on past *cy pres* abuses that have nothing to do with this case. Petitioners miss the point: *Cy pres* relief provides the best available mechanism to resolve low-settlement-value claims in a way that provides widespread, meaningful benefits to large and indeterminate classes. The *cy pres* settlement approved here illustrates how a properly guided exercise of equitable discretion avoids the abuses that petitioners deride, while benefiting class members far more than the *de minimis* payments to a trivial proportion of the class that (if petitioners have their way) would be the only permissible remedy. In the narrow category of cases eligible for *cy pres* relief, petitioners' rigid prohibition of *cy pres* relief would either prevent settlements or divert settlement funds from class members to claims administrators.

Google agrees with petitioners that class actions—and class-action settlements—can lead to abuse. We agree as well that district courts should carefully scrutinize settlements to ensure that they provide benefits to the class that accord with a reasonable assessment of the case's value. Here, everybody agrees that the amount of the settlement was adequate under Rule 23(e); indeed, the government suggests that Google may have paid too much. Nor is there any doubt that an effort to identify and compensate all class members—even a nontrivial proportion of them—would have exhausted the settlement fund.

Petitioners' proposed ban on *cy pres* settlements would not solve any underlying problems with class

actions. To the contrary, accepting petitioners' position would eliminate a valuable tool needed to compromise a small category of cases where the administrative costs of direct payments to class members are prohibitive. Banning *cy pres* settlements thus would make class-action litigation even more costly and inefficient, imposing a cure that worsens the disease.

That is not to say that *cy pres* remedies should be common. Rather, district courts should have discretion to approve a *cy pres* remedy only if three conditions are satisfied:

(1) the settlement fund, while sufficient in light of the lawsuit's merits, cannot feasibly be distributed to the class members after administrative and other costs are paid;

(2) the recipients of *cy pres* awards commit to use distributed funds in a specified way that benefits the class or substantial portions of it and addresses issues related to the basis of the lawsuit; and

(3) the recipients are independent of the parties, their counsel, and the district court.

The settlement here satisfies these conditions. Petitioners have no serious response to the findings of both lower courts that it was infeasible to distribute approximately $5 million in settlement funds to the indeterminate class of 129 million people; administrative costs would consume even small payments to even 1% of the class. The *cy pres* recipients are of the highest quality and submitted detailed, grant-like proposals for projects closely targeted to the Internet privacy issues raised by plaintiffs' claims. Class members apparently agreed that the settlement's benefits to them were

sufficient; only 13 opted out of the class. And, unable to identify material conflicts of interest, petitioners are forced to maintain that institutions such as Harvard's Berkman Center for Internet & Society cannot act independently simply because a graduate of Harvard Law School represents a party.

Petitioners have presented no basis to deprive courts of the equitable power to approve *cy pres* settlements, like this one, that meet the limiting criteria above. The judgment of the court of appeals should be affirmed.

STATEMENT

A. Factual Background

Respondent Google LLC operates a free Internet search engine that processes more than a billion search requests every day. JA16-17.[1] When a user submits search terms, within a fraction of a second Google Search returns a list of relevant websites in a new "search results page." JA17, 24.

To produce each search results page, Google's servers first generate a unique Uniform Resource Locator, or URL, that includes information about the user's search query. JA17. Users can then click one of the links provided on the search results page, which redirects the user to the desired site. *Ibid.*

In the normal course of operation at the time the complaints were filed, the user's web browser (*e.g.*, Internet Explorer or Safari) transmitted to that website information known as a "referrer header." See JA17. The referrer header communicated the

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[1] These facts are drawn largely from plaintiffs' pleadings. Google does not admit their truth or accuracy.

URL of the webpage that the user last visited, informing the requested website how the user got to the page. *Ibid.*; see *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1102 (9th Cir. 2014) (explaining how referrer headers work). If a user clicked on a website from Google's search results page, the referrer header generated by the user's web browser communicated the URL of the search results page, which, according to plaintiffs, included the user's search terms. JA17.

B. Proceedings Below

1. *The* Gaos *and* Priyev *actions*

Plaintiffs alleged that Google violated their privacy rights when referrer headers were disclosed to third-party websites. The purported privacy violation resulted from the alleged reproduction of users' search terms in the URL of the search results page.

a. In 2010, respondent Paloma Gaos filed a putative class-action complaint against Google in the Northern District of California. See 5:10-cv-04809-EJD (N.D. Cal.), Dkt. No. 1. Gaos asserted violations of the Stored Communications Act of 1986 ("SCA"), 18 U.S.C. 2701 *et seq.*)), as well as several California state-law claims. The district court granted Google's motion to dismiss the initial complaint because Gaos had "failed to plead facts sufficient to establish Article III standing" for any of her claims. JA21.

Gaos's first amended complaint raised largely the same claims. This time, the district court dismissed all but Gaos's SCA claim. JA31.

The district court explained that "Gaos does not identify what injury resulted" from the alleged

dissemination of search queries in referrer headers, and thus had failed to "allege[] injury sufficient for Article III standing with respect to her non-statutory causes of action." JA26. Nonetheless, the court concluded that Gaos had standing to pursue her SCA claim based on *Edwards* v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), cert. granted, 564 U.S. 1018 (2011), cert. dismissed, 567 U.S. 756 (2012), which held that asserting the bare violation of a statute established Article III standing "without additional injury." JA29.[2] The district court cautioned, however, that "although Gaos ha[d] alleged sufficient injury for standing based on a violation of the SCA" in light of *Edwards*, "this finding does not mean Gaos has properly stated a claim for relief under the SCA." JA30 n.4.

Gaos, joined by additional plaintiff Anthony Italiano, filed a second amended complaint (SER746-788) in an attempt to cure the defects identified by the district court.[3] That complaint speculated that a website operator or other unidentified third party could identify someone based on search terms because Google's users, including plaintiffs, sometimes conduct "vanity searches"—*i.e.*, searches for their own names. SER776. Plaintiffs further speculated that, although referrer headers do not

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[2] This Court since has held that a plaintiff does not "automatically" satisfy Article III standing requirements "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016). Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.*

[3] "SER__" refers to respondents' Supplemental Excerpts of Record in the court of appeals.

specify a user's name, a hypothetical "adversary" could use the "Science of Reidentification" to "combine anonymized data" from referrer headers "with outside information to pry out obscured identities." SER770-773.

Google once again moved to dismiss on standing and other grounds. That motion was fully briefed but never decided.

b. In February 2012, respondent Gabriel Priyev filed a similar action in the Northern District of Illinois. See 12-CV-01467 (N.D. Ill.), Dkt. No. 1. Google moved to dismiss that complaint as well.

Rather than defend the original complaint, Priyev twice amended it. Before Google responded to the second amended complaint, the *Priyev* action was transferred to the Northern District of California and consolidated with *Gaos*. All of the plaintiffs then filed a consolidated class-action complaint (SER660-707), seeking to represent "[a]ll persons in the United States who submitted a search query to Google at any time between October 25, 2006 and the date of notice to the class of certification." SER697 (emphasis omitted).

2. *The proposed settlement and its approval*

After an all-day mediation session, the parties entered into a settlement agreement and release in March 2013. Pet. App. 69-111. The settlement class tracks the class definition in the consolidated complaint and is estimated at 129 million members. Pet. App. 5. Google agreed to pay $8.5 million, which was to be put into a settlement fund. After covering notice and administrative costs, $5,000 incentive awards for each of the three named plaintiffs, and whatever amount of reasonable attorneys' fees and

costs the district court awarded, the remainder (approximately $5.3 million) would be distributed among six *cy pres* recipients to fund projects devoted to Internet privacy issues and designed to benefit broad segments of the plaintiff class: Carnegie Mellon University; World Privacy Forum; Illinois Tech's Chicago-Kent College of Law Center for Information, Society, and Policy; Stanford Law School Center for Internet and Society; Berkman Center for Internet & Society at Harvard University; and AARP Foundation. Pet. App. 5, 24-25.

At the preliminary approval hearing, class counsel explained that the parties had sought to "rais[e] the bar for all cy pres settlements" by "treating the cy pres allocation more like a grant making organization would treat * * * prospective grant recipients." JA39. Specifically, class counsel sent letters to proposed recipients seeking written proposals on "exactly what they're going to do, who is on staff, and how the budget will be allocated within the project" and asking recipients to commit to "a set of metrics that they can use to measure the success of the program" which would be "publish[ed] to the class and to the court down the road." JA50-51.

Potential recipients responded to this invitation with detailed proposals. See JA53-81.[4] The Stanford Center for Internet and Society, for example, proposed using *cy pres* funding for a variety of projects bearing on Internet privacy issues, including how best to provide notice of privacy practices to users accessing the Internet on mobile devices;

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[4] The joint appendix includes executive summaries of the proposals that were accepted. The full proposals are appended to the class respondents' brief.

analysis of and a conference on pending Internet privacy legislation; and in-person and online education efforts addressing consumer privacy online. JA58-61. Chicago-Kent proposed to develop an online "Privacy Preparedness Guide" and associated videos, online outreach, and in-person training sessions and conferences targeting Internet privacy. JA73-75. And Carnegie Mellon proposed the technical "design of specific interfaces and tools that improve privacy for class members and other users; as well as algorithms that could be used * * * to measure the privacy compliance of various web-based systems, including search engines." JA57. Each proposed recipient also listed previous contributions by Google. Pet. App. 17.

Google also agreed to make additional disclosures on its website to better inform its users how referrer headers and web history operate and to direct them to more information on how Google handles search queries generally. Pet. App. 40, 82.

The district court granted preliminary approval of the settlement. JA82-100. The court observed that "[t]his case is somewhat unique in that the size and nature of the class renders it nearly impossible to determine exactly who may qualify as a class member." JA98. "In fact," it noted, "this class potentially covers all internet users in the United States." *Ibid.* Under this circumstance, the court found, "the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class." JA96.

Recognizing that direct notice was not possible, the district court approved the parties' proposed notice campaign. JA98. That campaign included (1)

Internet banner ads in English and Spanish; (2) press articles; (3) a bilingual website dedicated solely to the settlement; and (4) a toll-free telephone number where class members could obtain additional information and request a written class notice. Pet. App. 39.

Only 13 of the 129 million putative class members—about 0.00001%—opted out of the class, and only five class members (including the two petitioners) entered written objections. Pet. App. 6.

After an extensive fairness hearing (JA111-169), the district court granted final approval of the settlement (Pet. App. 31-61), holding that petitioners and the other objectors had not met their burden of demonstrating that the settlement was not fair, adequate, and reasonable. In particular, the court rejected petitioners' argument that a *cy pres*-only settlement class should never be certified. Pet. App. 37-38 (citing *Lane* v. *Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), cert. denied *sub nom. Marek* v. *Lane*, 571 U.S. 1003 (2013); *Nachshin* v. *AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011)). The district court additionally found that petitioners and the other objectors failed to overcome class counsel's showing that the "cost of distributing [the] settlement fund to the class members would be prohibitive" in light of the size of the class and the administrative expense of direct distribution. Pet. App. 58.

The district court also recognized "the very real risk of never obtaining or losing class status in the absence of settlement." Pet. App. 45. And the court characterized the settlement amount as more than adequate in light of the "significant and potentially case-ending weakness in the SCA claim brought

about by the Ninth Circuit's decision in *Zynga Privacy Litigation*." Pet. App. 58-59.

Finally, the court rejected the objectors' contention that the *cy pres* recipients were tainted by conflicts of interest. Having reviewed the recipients' proposals (Pet. App. 48), the court observed that the recipients "have a record of promoting privacy protection on the Internet, reach and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online privacy risks." Pet. App. 47-48.

3. *The Ninth Circuit's decision*

The Ninth Circuit affirmed. Pet. App. 1-23. Considering "*cy pres*-only settlements * * * the exception, not the rule," the court of appeals rejected petitioners' argument that *cy pres*-only settlements are categorically improper. Pet. App. 8. Rather, those settlements may be appropriate "where the settlement fund is 'non-distributable' because 'the proof of individual claims would be burdensome or distribution of damages costly.'" *Ibid.* (quoting *Lane*, 696 F.3d at 819).

The Ninth Circuit upheld the district court's finding that the settlement fund was not distributable. The court observed that the ratio of the fund amount to be distributed ($5.3 million) to the class of 129 million individuals was a "paltry" sum of four cents per class member. Pet. App. 9. In addition, the court approved the district court's finding that trying to compensate even a small percentage of class members—"millions"—would consume the settlement fund: "sending out very small payments to millions of class members would exceed the total

monetary benefit obtained by the class." *Ibid.* (quoting district court).

The court of appeals rejected petitioners' categorical preference for payments to a "min[u]scule portion of the class"—either through a "random lottery distribution" or by offering a small sum "on the assumption that few class members will make claims." Pet. App. 9. The court noted that, although an alternative settlement of that kind may be technically "possible," it was not required so long as the actual settlement is fair, reasonable, and adequate under Rule 23(e). Pet. App. 9-10.

The court then turned to the six *cy pres* recipients. It chastised petitioners for their "unfair and untrue" assertion that the district court "rubber-stamped the settlement." Pet. App. 12. Instead, the court of appeals held, the district court correctly found that the six *cy pres* recipients satisfy the "'nexus' requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members." Pet. App. 12-13. The court noted the rigorous "selection process employed to vet the *cy pres* recipients in this litigation" and the district court's "careful[] review" of the "detailed proposals" submitted by the recipients. Pet. App. 16. And because the recipients met the exacting standards mandated by the court's precedents, Google's previous donations to some recipients and the fact that some recipients "are organizations housed at class counsel's *alma maters*" were not "absolute disqualifier[s]" as petitioners urged. Pet. App. 12-16.

In other words, petitioners had failed to "raise substantial questions about whether the selection of the recipient[s] was made on the merits." Pet. App.

14 (quoting Principles of the Law of Aggregate Litigation § 3.07 cmt. b (Am. Law Inst. 2010) ("ALI Principles")). The court observed, for instance, that "some of the recipient organizations have challenged Google's Internet privacy policies in the past" and that "[e]ach recipient's *cy pres* proposal identified the scope of Google's previous contributions to that organization, and * * * explained how the *cy pres* funds were distinct from Google's general donations." Pet. App. 16-17 & n.7. Likewise, the court concluded that because "[t]he recipients are well-recognized centers focusing on the Internet and data privacy," petitioners' argument that the settlement should be invalidated merely because class counsel have degrees from some of the institutions that house the recipients "can't be entertained with a straight face." Pet. App. 19.

Judge Wallace "agree[d]" with the majority "that a *cy pres*-only settlement was appropriate in this case," Pet. App. 23, and "express[ed] no opinion on the definitive fairness" of the settlement, Pet. App. 30. Dissenting in part, he would have remanded to the district court for further fact-finding about the selection of the specific *cy pres* recipients. Pet. App. 24, 30.

SUMMARY OF ARGUMENT

1.a. Like the class action itself, the *cy pres* doctrine is rooted in equity practice. The class action evolved in response to challenges in efficiently adjudicating disputes where numerous similarly situated parties had common claims against an adversary. And the same courts developed the *cy pres* doctrine when funds held in trust could not be spent in accord with the first choice of the settlor.

The two doctrines logically converged in response to the increased use of class actions after the 1966 revisions to the Federal Rules of Civil Procedure. Modern class actions more frequently presented insuperable challenges to direct distribution of class settlement funds or damages awards.

Until distributed, a class settlement is held in trust for the class members. When direct payments are not feasible, *cy pres* remedies provide the next best method of delivering benefits to the class.

b. The federal courts retain the power to approve *cy pres* relief. The Federal Rules of Civil Procedure did not silently abrogate the equitable powers of the district courts, and no Rule expressly addresses *cy pres*.

Nor does the Rules Enabling Act, 28 U.S.C. 2072, somehow bar approval of a *cy pres* settlement. That relief does not "abridge, enlarge or modify" any substantive right. Any class member who wants to seek individual damages may do so. But others are as free as any individual litigant to compromise their claims for a noncash benefit. And a *cy pres* settlement does not modify substantive rights merely because noncash relief is not mentioned in the source of law providing the cause of action. As this Court has repeatedly recognized, relief imposed by settlement may differ from what could be imposed after trial.

And the professed concerns about compelled speech in violation of the First Amendment are insubstantial; an objecting class member can simply opt out. In any event, petitioners' First Amendment concerns could not justify a complete prohibition on

cy pres settlements; even here, petitioners challenge only one of the six recipients on that basis.

2. *Cy pres* settlement relief is "fair, reasonable, and adequate" under Rule 23(e) when it meets three criteria. The settlement here satisfied each.

a. *First*, direct distribution of settlement funds to class members must be infeasible. That most often occurs when an adequate settlement amount provides little money per class member and the administrative cost of direct distribution is high because the class members are neither known nor readily ascertainable.

Here, the settlement provided four cents per class member. The costs of identifying, verifying, processing, and paying claims would exceed available funds unless the claims rate was substantially under 1%. Confirming the claims rate would siphon off still more of the settlement to the claims administrator.

b. *Second*, there must be a nexus between the proposed use of *cy pres* distributions by the chosen recipients and the issues raised by the lawsuit, to ensure that class members benefit from the settlement that are related to the claims in the complaint. The recipients here were well-established entities, primarily at premier academic institutions. Each submitted a detailed proposal directed at protecting consumers' privacy on the Internet. That proposed technical, policy, and educational activity would benefit the class as a whole far more than token payments to a few class members—especially for the 99% or more who would receive nothing.

c. *Third*, the *cy pres* recipients must be independent of the parties, their counsel, and the district court. That fact- and case-specific analysis is

necessarily discretionary. Here, Google had previously made donations to several recipients in amounts that were lower than the *cy pres* distributions proposed here, and that were not tailored to benefit the class. Far from the "allies" petitioners depict, two of the recipients had complained to the FTC about Google practices. Petitioners also challenge the Harvard, Stanford, and Illinois Tech/Chicago-Kent recipients on the ground that some of plaintiffs' counsel attended those law schools. As the court of appeals observed, that contention does not pass the straight-face test.

d. Petitioners' concerns about attorneys' fees speak to a broader issue with the administration of class actions. Because the same considerations arise in *cy pres* settlements that arise in other settlements, any constraint on district courts' discretion to award fees should apply equally to all class actions. Imposing a lodestar hourly model as a presumptive measure for attorneys' fee awards would help properly align incentives with sound policy.

ARGUMENT

I. Federal Courts Have The Power To Approve *Cy Pres* Remedies In Class-Action Settlements.

A. *Cy pres* is an appropriate exercise of the federal courts' equitable powers.

The class-action device and the *cy pres* doctrine share roots in the courts of equity. The convergence of these practices in the form of *cy pres* remedies in class-action settlements is an appropriate and unremarkable step in the centuries-long evolution of equity practice.

1. *Class actions are an "invention of equity."*

Rule 23 "stems from equity practice." *Amchem Products Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997); accord *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832-33 (1999) (describing Rule 23's equitable "roots"). The class suit itself was "an invention of equity"—a solution to the problem of providing redress when only some of the injured group members could be identified or feasibly brought before the court. *Hansberry* v. *Lee*, 311 U.S. 32, 41 (1940).

As Justice Story articulated English equity practice, where "the parties are very numerous[] and the court perceives[] that it will be almost impossible to bring them all before the court; or where the question is of general interest," the "administration of justice" was better served by permitting some subset of the injured parties to proceed—through a representative action where appropriate—on the theory that imperfect redress was better than no redress at all. *West* v. *Randall*, 29 F. Cas. 718, 722 (No. 17,424) (C.C.D.R.I. 1820) (Story, J.); see also *Ortiz*, 527 U.S. at 833. Thus, "the Court of Chancery groped its way toward a theory of the lawsuit that has become, with its many embellishments and contradictions, the modern class action." S. Yeazell, From Medieval Group Litigation to the Modern Class Action 69 (1987).

Early American courts borrowed from English bills of equity that used representative litigation to address contemporary needs. See Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 687-88, 709 & n.79 (1941) (collecting cases). Among these was the bill of peace, which would lie "to establish the title of the plaintiff against numerous parties insisting upon the same

right." *Whitehead* v. *Shattuck*, 138 U.S. 146, 153 (1891).

The creditor's bill emerged around the same time. Yeazell, *supra*, at 222. This Court confirmed that the creditor's bill, "a suit in equity * * * for the common benefit of all," provided "the only appropriate remedy in the courts of the United States" for competing creditors with claims to the assets of an insolvent corporation. *Stone* v. *Chisolm*, 113 U.S. 302, 308-09 (1885). This rule was designed to prevent "the grossest inequality" that would result if an "individual creditor" could "collect the whole amount of his claim against the corporation * * * to the exclusion of other creditors whose claims are equally meritorious." *Low* v. *Buchanan*, 94 Ill. 76, 80 (1880). The creditor's bill evolved into the "common fund" class. See Fed. R. Civ. P. 23(b)(1), Advisory Comm. Note (1966).

Early group litigation rules codified equitable practice. See Fed. R. Eq. 48 (42 U.S. (1 How.) xlii, lvi (1843)). In particular, Federal Equity Rule 38 made clear that absent parties would be bound by any action brought on their behalf—as this Court had suggested in *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288 (1853). Equity Rule 38 provided: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 363-64 (1921) (quoting 33 S. Ct. xxix). Federal Equity Rule 38 was ultimately incorporated into Rule 23 of the original Federal Rules of Civil Procedure. And the numerosity and commonality factors in current Rule 23(a)(1)-(2) reflect equity class-action practice.

In sum, the class action evolved as an "invention of equity," *Hansberry*, 311 U.S. at 41, crafted to accommodate shifting societal norms and needs to redress group harms. "[S]ome affirmative technique for bringing everyone into the case and making recovery available to all" was required, Kalven & Rosenfield, *supra*, at 688—especially for claims that would otherwise be "too small to warrant individual litigation," *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968).

Because Rule 23 resulted from the natural progression of equitable rules, nothing suggests an intent to shut the equitable toolbox that courts had long used to remedy group wrongs. Indeed, far from abolishing (or precluding) equitable practices not specifically addressed, Rule 23, like other rules promulgated under the Rules Enabling Act, 28 U.S.C. 2072, left those doctrines and practices in place.

2. *The* cy pres *doctrine is likewise rooted in inherent equitable powers.*

The use of *cy pres* in the United States is also rooted in equitable practice. *Cy pres* gained popularity in American courts in the early 20th century with "the great increase in charitable trust property." E. Fisch, The Cy Pres Doctrine in the United States 173-74 & n.24 (1950) (collecting cases). It provided a means of saving charitable trusts that "might otherwise be thwarted by the impossibility of the particular plan or scheme provided by the testator." *Evans* v. *Abney*, 396 U.S. 435, 441 (1970); see, *e.g.*, *Estate of Hinckley*, 58 Cal. 457, 512-13 (1881) ("general devolution * * * of all judicial power" includes "power of *cy pres*").

From the legal French phrase *cy près comme possible*, literally "as near as possible," *cy pres* "is the doctrine that equity will, when a charity is originally or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible." Bogert's Trusts and Trustees § 431 (2018); Restatement (Third) of Trusts § 67 cmt. a (2003) (settlor's "intention will be given effect 'as nearly' as may be"). For example, when a settlor proposed to establish a hospital in her name but a different hospital was formed in the interim, *cy pres* was used to maintain a ward in the existing hospital. *Adams* v. *Page*, 79 A. 837, 838 (N.H. 1911).

3. Cy pres *converged with the class device in response to the shifting nature of class actions.*

The *cy pres* doctrine serves an analogous purpose in the class settlement context. A class action settlement creates a fund that matches the value of the claims, which raises the question how to dispose of that fund. "In class actions, courts have approved creating cy pres funds, to be used for a charitable purpose related to the class plaintiffs' injury, when it is difficult for all class members to receive individual shares of the recovery and, as a result, some or all of the recovery remains"—whether because the sheer cost of notice and claims administration would exhaust the class settlement fund, or because class members are too difficult (and expensive) to locate or identify. *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 588 F.3d 24, 33-34 (1st Cir. 2009) (Lynch, J.); see *Masters* v. *Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (Miner,

J.); *Powell* v. *Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997) (Arnold, J.).

The *cy pres* solution reflects "[t]he essence of equity jurisdiction": "the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *United States* v. *Noland*, 517 U.S. 535, 540 (1996) (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944)). Equitable "flexibility" (*Hecht*, 321 U.S. at 329) of this kind is especially appropriate because the framers of the 1966 Rules amendments "anticipat[ed] innovations under Rule 23(b)(3)." *Ortiz*, 527 U.S. at 842.

Cy pres doctrine logically and legitimately converged with the class-action device shortly after the adoption of Rule 23(b)(3) in 1966 expanded the availability of class actions for damages. The growth in those actions led to two problems in class administration: (1) uncollected damages, see, *e.g.*, Shepherd, Note, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972); and (2) difficulties in the distribution of funds where "the amount expended on the paper work which would be necessary in order to file and prove a claim may exceed the amount of damages sustained," *Eisen*, 391 F.2d at 567.

Both problems arise in class actions where any actual harm is so abstract, small, or doubtful that it is difficult to quantify. As the Ninth Circuit observed in a case where the "average individual recovery" was estimated at only "two dollars" if the plaintiffs won outright, "the amount of recovery would be entirely consumed by the costs of notice alone," so that the "principal, if not the only" party who benefits from a direct-compensation order is the plaintiffs' counsel. *In re Hotel Telephone Charges*,

500 F.2d 86, 91 (9th Cir. 1974); see also *Democratic Central Comm. of D.C.* v. *Washington Metropolitan Area Transit Comm'n*, 84 F.3d 451, 455 (D.C. Cir. 1996) (per curiam) ("The prohibitive cost of notification, together with the cost of distribution, would greatly reduce, or even exceed, the total amount of the funds.").

In short, class-settlement *cy pres* arose out of a need for a "pragmatic and sensible" solution to the problem of class compensation in low-value, large-class settlements. *New York ex rel. Koppell* v. *Keds Corp.*, 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994); *Miller* v. *Steinbach*, 1974 WL 350 (S.D.N.Y. Jan. 3, 1974). In these circumstances, a settlement that provides a benefit to be shared by the entire class comes closer to effectuating the purpose of the class suit, and Rule 23(b)(3)'s broader goal of class compensation, than does a large payment to a claims administrator and at best small payments to a tiny subset of the class.

4. *The use of* cy pres *in class settlements reflects the fiduciary character of class actions.*

It made doctrinal as well as practical sense to adapt the equitable *cy pres* device developed in the trust setting as an "evolutionary response," *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980), for use in class actions where the fund that class representatives have obtained is too small to be distributed to class members. This Court and other courts have recognized a "class representative's fiduciary duty" to the absent class members. *Standard Fire Ins. Co.* v. *Knowles*, 568 U.S. 588, 594 (2013) (citing *Back Doctors Ltd.* v. *Metropolitan Property & Casualty Ins. Co.*, 637 F.3d 827, 830-31

(7th Cir. 2011)); see also *Deposit Guaranty*, 445 U.S. at 344 n.4 (Stevens, J., concurring). Indeed, the Court long ago noted that a shareholder who sues in a corporate derivative action "assumes a position, not technically as a trustee perhaps, but one of a fiduciary character" because "[h]e sues * * * as representative of a class comprising all who are similarly situated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549 (1949). Because of this "fiduciary character," "this Court has found it necessary * * * to impose procedural regulations of the class action not applicable to any other." *Id.* at 549-50.

Class representatives' fiduciary role is particularly close to that of a traditional trustee when settlement funds earmarked for the class have not yet been distributed. The notion of a class representative as trustee in that circumstance dovetails with traditional equity jurisprudence addressing "limited fund" class actions. That jurisprudence recognized that a plaintiff who sues to protect a common fund on behalf of himself and others similarly situated has "acted the part of a trustee in relation to [that] common interest." *Internal Improvement Fund Trustees* v. *Greenough*, 105 U.S. 527, 532 (1881). In a common fund, *all* class members (not only those who file claims) are "the equitable owners of their respective shares in the recovery." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 482 (1980).

Equity demands no less in the modern class-action context, whether the class is certified under the common-fund provision in Rule 23(b)(1) or under the other two subsections of Rule 23(b). The class representative or class counsel who obtains the class

settlement effectively assumes the role of a trustee with a duty to act in the best interests of *all* class members. See Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 Yale L.J. 1591, 1600 (1987).

5. *A settlement providing class members noncash benefits is consistent with a class representative's fiduciary duty.*

Voicing an unexplained prejudice favoring minimal cash payments over any other relief, petitioners urge that a class representative's fiduciary obligations *compel* parties to settle large-class, small-value claims in a way that wastes most or all of the settlement fund on administrative costs in order to confer a trivial benefit on a minuscule portion of the class. But that premise runs counter to this Court's recognition that a remedy need not be "pecuniary" or involve direct remuneration in order to confer a "substantial benefit" on absent class members. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 394-95 (1970).

The Principles of the Law of Aggregate Litigation agree: "Nothing in this Section [3.07] would require that a settlement actually recover money for class members, so long as the class is apprised of that fact in a properly constructed settlement notice." ALI Principles, *supra*, § 3.07 cmt. b. Moreover, the class representative owes a fiduciary duty to the *entire* class—not just to the few who might file claims. The class device developed in part to "ensure[] that * * * the class as a whole was given the best deal" when a "limited fund" or single resource was available to satisfy common claims shared by numerous potential plaintiffs. *Ortiz*, 527 U.S. at 839. The decision to aggregate otherwise trivial recoveries into a fund

that can confer a meaningful benefit on the *whole* class is entirely compatible with the class representative's fiduciary obligations.

B. No valid legal principle prohibits *cy pres* settlements.

Petitioners and their *amici* contend that, as a matter of law, *cy pres* awards are never permitted in class-action settlements. Petitioners maintain that the Rules Enabling Act and the First Amendment preclude approval of *cy pres* settlements. Neither does so.

1. Cy pres *settlements are consistent with the Rules Enabling Act and the Federal Rules of Civil Procedure.*

Petitioners—elliptically (Br. 33)—and some *amici* contend that approval of a *cy pres* settlement violates the Rules Enabling Act, 28 U.S.C. 2072. But Rule 23(e) authorizes courts to approve settlements so long as they are fair, reasonable, and adequate. The Rules Enabling Act provides that federal rules of procedure shall not "abridge, enlarge or modify [a] substantive right." 28 U.S.C. 2072(b). This provision is not implicated when a court approves a proposed class settlement, because "a class-action settlement—like any settlement—is a private contract of negotiated compromises," *not* a "substantive adjudication of the underlying causes of action." *Marshall* v. *National Football League*, 787 F.3d 502, 511 n.4 (8th Cir. 2015). Every court of appeals to squarely consider the question has thus concluded that a decision to approve a class settlement "does not implicate the Rules Enabling Act." *Ibid.*; see also *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1116 (10th Cir.

2017); *Sullivan* v. *DB Investments, Inc.*, 667 F.3d 273, 312 (3d Cir. 2011).

In addition, the Rules Enabling Act does not abrogate the equitable powers of the federal courts. On the contrary, this Court has recognized that the district courts retain significant inherent powers that the Rules do not displace.[5] A court can approve an individual settlement that directs funds to a third-party recipient, and it can do so in a class context so long as it complies with appropriate equitable constraints.[6] Indeed, if Rule 23 limited this discretion, it might alter substantive rights in violation of the Act. Tellingly, neither the 2018 amendments to Rule 23 nor any prior amendments limit the availability of *cy pres* settlements. After significant discussion, the Rules Committee declined to act on suggestions that it do so. See Agenda, Committee on Rules of Practice and Procedure 424 (Jan. 7-8, 2016) (noting use of "more creative awards * * * in cases involving small injuries to large

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[5] *E.g.*, *Landis* v. *North American Co.*, 299 U.S. 248, 255 (1936) (stay of litigation); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962) (sanctions such as dismissal for want of prosecution); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507-08 (1947) (dismissal on *forum non conveniens* grounds); *Luce* v. *United States*, 469 U.S. 38, 41 n.4 (1984) (*in limine* evidentiary rulings).

[6] Individual plaintiffs routinely settle legal disputes in exchange for the defendant's agreement to do something for a third party. See, *e.g.*, https://bit.ly/2wbHspW ($200,000 payment by city to community program to settle lawsuit over Starbucks arrest); https://bit.ly/2ojoabo (payment by toy company of $1 million to education charities to settle lawsuit by Beastie Boys); https://bit.ly/2wgIoqH (payment to Make-A-Wish foundation to settle patent litigation).

numbers of consumers, most of whom cannot be easily identified"), https://bit.ly/2Ly1gX3.

Thus, it makes no difference if, as petitioners maintain, "[s]ettlement fund proceeds * * * belong solely to the class members." Pet. Br. 33 (quoting *Klier* v. *Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (in turn citing ALI Principles, *supra*, § 3.07 cmt. b)). That beneficial ownership simply underscores the class representative's trustee-like role, and the propriety of using the *cy pres* device when a settlement fund cannot feasibly be distributed to the individual class members.

It is equally irrelevant that underlying causes of action ordinarily do not provide for a *cy pres* remedy. A "federal court is not necessarily barred from entering a consent decree"—a type of settlement—"merely because the decree provides broader relief than the court could have awarded after a trial." *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 525 (1986). *Cy pres* payments are not punishment, but are part of an agreed-upon resolution of plaintiffs' claims that benefits plaintiffs.

And a party does not need specific statutory authorization to settle a cause of action on particular terms. That is because a "legal settlement agreement is a contract." *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1065 (2015). "[P]art of the consideration" for the contract is the "dismissal" of the claims by the plaintiff. *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). In return, the plaintiff may accept any course of conduct from the defendant that does not violate public policy. See generally Restatement (Second) of Contracts § 79 (1981). And

the defendant's "return promise may be given to the [plaintiff] or to some other person." *Id.* § 71(4). "It matters not from whom the consideration moves or to whom it goes." *Id.* § 71 cmt. e.

2. *The First Amendment does not foreclose* cy pres *settlements.*

Petitioners argue that *cy pres* relief should be prohibited because it can "infringe upon the First Amendment rights of class members by requiring them to subsidize political organizations they disapprove of without their explicit consent." Pet. Br. 17. This issue at most could affect the selection of some recipients in some cases. Here, petitioners claim that only one *cy pres* recipient (the AARP) implicates their expressive rights by using petitioners' roughly 0.7-cent individual contributions (*i.e.*, 1/6 of their 4-cent share of the settlement). See Pet. App. 131.

There is no compelled speech here. Consistent with Fed. R. Civ. P. 23(e)(4), Section 6.1 of the settlement agreement entitled class members to opt out of the settlement for any reason. Pet. App. 87. That option is open to any class member who does not want to be associated with speech undertaken by a *cy pres* recipient. This Court determined more than 30 years ago that opt-out provisions generally satisfy the due-process rights of absent class members. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985).[7] The Court's rationale for approving opt-out

[7] Petitioners have not adequately raised a due process challenge merely by quoting (Br. 30) from a law review article saying that "cy pres threatens the due process rights of * * * class members"; petitioners never say how. The suggestion by Cato Institute that Rule 23(b)(3) itself violates due process is a critique of class actions, not of *cy pres* settlements.

processes in *Shutts* applies with equal force here. "[T]he Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." *Id.* at 813.

Contrary to *Shutts*, petitioners contend that "silence is not consent." Pet. Br. 37 (citing *Knox* v. *SEIU, Local 1000*, 567 U.S. 298 (2012)). That assertion proves too much, as the class-action system is based on the proposition that individuals with little to gain from pressing individual actions can be presumed to join in a collective action. Moreover, *Knox* did not impugn the effectiveness of opting out, but on the contrary cut short an effort to nullify an opt-out arrangement. 567 U.S. at 314. *Knox* thus weighs against petitioners' position.[8]

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[8] In invalidating the mandatory agency-shop arrangements that formed the backdrop for *Knox*, the Court emphasized that its decision was limited to the public sector. *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2479 & n.24 (2018). The Court found it "questionable" that "Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action" for First Amendment purposes. *Ibid.* (citing *American Manufacturers Mutual Ins. Co.* v. *Sullivan*, 526 U.S. 40, 53 (1999)).

Under that reasoning, a district court's decision to approve a proposed settlement under Rule 23(e) is not state action triggering the First Amendment. This Court has "never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it." *Sullivan*, 526 U.S. at 53.

II. To Be Fair, Adequate, And Reasonable, *Cy Pres* Relief Must Satisfy Appropriate Conditions, Which This Settlement Did.

Approval of *cy pres* class-action settlements comes within the courts' equitable powers for the reasons discussed above. But that does not mean that awards of *cy pres* relief are "fair, adequate, and reasonable" in every case. Fed. R. Civ. P. 23(e). On the contrary, as the court of appeals recognized, *cy pres* settlements must remain "the exception, not the rule." Pet. App. 8.

In "assess[ing]" the fairness of *cy pres* "as a general matter," this Court should "clarify the limits on the use of such remedies." *Marek*, 571 U.S. at 1003 (Roberts, C.J., respecting denial of cert.). Among those considerations are "whether new entities may be established"; "how existing entities should be selected"; the "respective roles of the judge and parties * * * in shaping a *cy pres* remedy"; and "how closely the goals of any enlisted organization must correspond to the interests of the class." *Ibid.*

To ensure an appropriate result under principles of equity and class-action law alike, *cy pres* relief should be limited to a narrow class of settlements that satisfy three conditions drawn from the consensus view of the courts of appeals.

First, *cy pres* relief should be used only when the settlement fund cannot feasibly be distributed to class members in meaningful amounts after administrative and other costs are paid.

Second, to be "fair, reasonable, and adequate" under Rule 23(e), *cy pres* relief must reflect a nexus between the uses to which the *cy pres* funds will be put and the interests of the class members—as the

courts of appeals uniformly require. A *cy pres* distribution must provide class members with some form of related benefit in exchange for releasing their claims, and thus would redress any injury class members may have sustained (cf. Gov't Br. 22-25).

Third, there should be no conflicts of interest among the proposed *cy pres* recipients, the parties, their counsel, and the district court. The touchstone is whether the selection is made on the merits of the proposals.

Because the settlement in this case satisfied each of these conditions, petitioners' parade of anecdotal abuses involves other cases, almost all of them decided before the Chief Justice's statement in *Marek*. The settlement here stands on its own, however, and the judgment of the court of appeals should be affirmed.

A. Payment to class members must be infeasible.

Cy pres by definition is a "next best" form of relief. Pet. App. 7 (quoting *Nachshin*, 663 F.3d at 1038). Approval of a *cy pres* settlement is a reasonable exercise of judicial discretion only if the available funds are sufficiently small and the class sufficiently large and indeterminate that payment to the class—usually the simplest and best relief—is not feasible.[9]

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[9] As the government notes, the 2018 amendments to Rule 23(e) will explicitly direct district courts to evaluate the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Gov't Br. 27 (quoting Fed. R. Civ. P. 23(e)(2)(C)(ii) (effective Dec. 1, 2018)).

This reflects the view of the courts of appeals that have addressed the issue. See, *e.g.*, *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (noting general agreement that "*cy pres* distributions are most appropriate where further individual distributions are economically infeasible"); accord *Klier*, 658 F.3d at 475 & n.15; *Masters*, 473 F.3d at 436; *Powell*, 119 F.3d at 706; *New York* v. *Reebok Int'l Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996) (any "distribution 'would be consumed in the costs of its own administration'").

Requiring the combination of a low (but adequate) settlement value and a large and indeterminate class will reserve *cy pres* relief for unusual cases like this one. Petitioners' approach to feasibility, by contrast, foreordains a categorical bar on *cy pres*, which would deprive litigants of the ability to compromise the class actions that most warrant early and efficient resolution.

1. *Direct payments are most often infeasible when actual injury is modest and intangible, class members are not easily identified, and administrative costs of distribution are high.*

A class-action settlement must be "adequate." Fed. R. Civ. P. 23(e)(2). In most cases, the adequacy criterion alone will foreclose a *cy pres*-only settlement, because the minimum amount required to make the settlement adequate will be large enough to permit direct distribution to a meaningful percentage of the class. But a very small settlement relative to the size of the class may be adequate, although cash payments are not feasible, if plaintiffs have low-injury claims, the merits of their case are weak, the law is unsettled, class certification faces

legal hurdles, or the case presents some combination of those factors. Tellingly, petitioners have not challenged the adequacy of the $5.3 million in potentially distributable funds in this case despite the estimated class size of 129 million. See Pet. Br. 41; Pet. C.A. Br. 8 (petitioners "didn't claim that the [case] necessarily needed to settle for more money").

a. While this Court's decision in *Spokeo*, 136 S. Ct. 1540, has helped weed out pure no-injury claims at the pleadings stage, some lower courts erroneously permit claims based on speculative injuries that present only a questionable "likelihood actually to harm" the plaintiff. *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017), cert. denied, 138 S. Ct. 931 (2018). Under a correct view of the law, there may well be bars to litigating such claims, or certifying them as class actions. So long as they are permitted to proceed, however, it must be possible to dispose of them on appropriate terms. Yet a minimal and indistinct injury that happens to survive dismissal on standing grounds is still minimal and indistinct, so that a modest amount of compensation, if any, may be "adequate" to compromise the claim under Rule 23(e).

b. Some courts have held that Rule 23 does not impose an "ascertainability" requirement independent of the express manageability criterion set forth in Rule 23(b)(3). See, *e.g.*, *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), cert. denied, 138 S. Ct. 313 (2017).[10] Although we believe that view is

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[10] Petitioners suggest (Br. 35) that the availability of *cy pres* relief drove the Ninth Circuit's rejection of an ascertainability requirement in *Briseno*. The court briefly mentioned *cy pres* remedies in rejecting due process concerns about adequate notice to class members, but rested its holding on a desire to

erroneous, unless and until this Court corrects it some unascertainable classes will continue to be certified. Yet payment to a meaningful percentage of the class is less likely to be feasible when there is no ready way to identify the persons to be paid. That is why "[c]y pres recovery is * * * ideal for circumstances in which it is difficult or impossible to identify the persons to whom damages should be assigned or distributed." *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997); see also *Masters*, 473 F.3d at 435-36.

In particular, the administrative expense of distributing funds to class members increases dramatically when the identity and location of class members are unknown.[11] Any distribution of proceeds to sprawling settlement classes of unidentifiable individuals either has to take any claimant's assertions at face value or include a prohibitively expensive verification process. And then the claims administrator would have to process class members' payment information and pay them—each step a costly undertaking. Even where the class in the aggregate is harmed by a defendant's alleged conduct, "identifying the actual people who suffered injury and issuing them a check is often so expensive that administrative costs swallow the entire recovery." Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 675, 683 (2010). This

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foster "[c]lass actions involving inexpensive consumer goods," 844 F.3d at 1128, along with the lack of an express reference to ascertainability in Rule 23, *id.* at 1125-26.

[11] An individual can run a Google search without logging into a Google account. Google also does not have addresses or similar identifying information for many Google account-holders. See SER152.

means that funds will go to claims administrators rather than class members.

c. The combination of low settlement value and high administrative costs required to make direct payments infeasible belies petitioners' hyperbolic assertion that "*almost every consumer-class action settlement*" could be *cy pres*-only. Pet. Br. 50-51. Petitioners rely on cases involving known class members, much larger settlement funds per class member, or both. For example, the Eighth Circuit in the *BankAmerica Corp. Securities Litigation* ordered further cash distribution solely to "lists of NationsBank class members who received and cashed prior distribution checks," so that the "potentially burdensome expense" of tracking down "class members whose checks were returned undelivered * * * need not be incurred." 775 F.3d 1060, 1064 (8th Cir. 2015). Similarly, in the revised settlement approved on remand from *Baby Products*, "[t]he parties used the Babies 'R' Us * * * purchase records to identify more than 1.1 million class members and their purchase and contact information." *McDonough* v. *Toys R Us, Inc.*, 80 F. Supp. 3d 626, 636 (E.D. Pa. 2015).

Petitioners approach absurdity when they suggest (Br. 50-51) that a *cy pres*-only distribution could be approved for the $115 million Anthem data breach settlement or the $135 million fund in *Sullivan*, based on an assumed 100% claims rate. Most relevant here, *Sullivan* upheld a $10 minimum threshold for distribution, recognizing that administrative costs would consume smaller distributions: "'*de minimis* thresholds for payable claims are beneficial to the class as a whole since they save the settlement fund from being depleted by

the administrative costs associated with claims unlikely to exceed those costs.'" 667 F.3d at 328 (quoting *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007)); see also, *e.g.*, *In re Wells Fargo Securities Litig.*, 991 F. Supp. 1193, 1196 & n.1 (N.D. Cal. 1998) (noting administrative costs of "approximately $5.50 per claimant" to distribute funds to a small, identified class of "2,619 claimants," which included "the cost of updating mailing lists and answering questions from claimants"); *Cicelski* v. *Sears, Roebuck & Co.*, 348 N.W.2d 685, 688 (Mich. Ct. App. 1984) (average recovery of $4.50 per claimant exceeded many times over by projected per-claimant administrative and notice costs).

At those rates, the fund here would be consumed entirely by administrative expenses even if less than 1% of the class submitted claims.

2. *Petitioners' definition of feasibility would categorically ban* cy pres *settlements and harm class members.*

Petitioners do not dispute that the courts of appeals have generally limited *cy pres* remedies to circumstances where a cash distribution of all or part of a settlement fund would not be feasible. See p. 31, *supra*. The ALI Principles section that petitioners cite recognizes that direct distribution is appropriate only "*[i]f* individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable." ALI Principles, *supra*, § 3.07(a) (emphasis added).

Yet petitioners propose a definition of feasibility that precludes *cy pres* relief. According to petitioners,

cy pres awards are not fair and reasonable "if it is feasible to distribute cash to *any* absent class members" (Pet. Br. 49)—presumably even one.

a. *A class may be better served by noncash benefits than by tiny payments to a sliver of class members.*

Petitioners cannot coherently explain why the class as a whole is better served by small payments to a minuscule portion of the class than by a well-tailored *cy pres* award that benefits many more class members. Paradoxically, petitioners bank on "the typically low claims rate in consumer and privacy class-action settlements" to make the distribution math work. Pet. Br. 44. Under their counterintuitive approach, a settlement is fair and adequate only on the assumption that the vast majority of class members will not benefit from the settlement at all, even though they are identically situated to the tiny fraction that would collect small payouts.

That only a tiny percentage of self-selected class members could possibly receive payments, however, weighs in favor of *cy pres* relief, not against it. For example, petitioners celebrate (Br. 44) a privacy settlement providing cash to 0.14% of the class. *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016). They similarly laud (Br. 42) one district court's exercise of discretion to distribute a small amount of money ($15) to 0.4% of class members. *Fraley* v. *Facebook, Inc.*, 966 F. Supp. 2d 939 (N.D. Cal. 2013), aff'd *sub nom. Fraley* v. *Batman*, 638 F. App'x 594 (9th Cir. 2016), cert. denied *sub nom. K.D.* v. *Facebook, Inc.*, 137 S. Ct. 68 (2016).

Petitioners cannot explain why these courts' exercises of discretion are per se preferable to a targeted *cy pres* award that could redress the alleged intangible injuries of many more class members. At some point, the proportion of class members receiving direct payments becomes so small that it is at least as "fair" and "reasonable" under Rule 23(e) to approve a *cy pres* distribution tailored to the issues in the case. *Cy pres* relief is more likely to provide a benefit to the class as a whole than petitioners' scheme, which leaves the overwhelming majority of class members with nothing at all. The response by class members to this settlement confirms the class's satisfaction with the settlement; despite a large-scale notice campaign, only one-in-ten-million class members opted out of the settlement.

Petitioners argue that settlement fund proceeds are the property of the class members. Pet. Br. 33. That is true but irrelevant. That the negotiated settlement belongs to the class proves nothing about how the class representatives, who owe fiduciary duties to the entire class, ought to distribute the proceeds.

Rather than grapple with the problem of claims-administration costs, petitioners suggest a "random lottery distribution to a percentage of claiming class members" (Br. 44) of whatever might be left after the administrative costs of soliciting claims, conducting the lottery, and paying the winners. But the benefits of appropriate *cy pres* relief surely are preferable to transforming federal courts into casinos. As the government notes, "[p]etitioners do not explain why a truly random distribution of settlement funds would be 'reasonable' under Federal Rule of Civil Procedure 23(e)(2) or why it would necessarily result

in greater relief to the class as a whole than a properly tailored *cy pres* award." Gov't Br. 27 n.2. Indeed, this two-stage claims process would likely divert all or almost all of a *cy pres*-worthy settlement fund to the claims administrator.

b. *Superiority should not rest on the size of the settlement amount.*

Finally, petitioners argue that, if a settlement fund cannot feasibly be distributed, courts should simply deny certification of the settlement class for failure to satisfy Rule 23(b)(3)'s superiority requirement. Pet. Br. 52-54. Their theory is that, because the benefits of a *cy pres* remedy will inure to a class member regardless of whether she remains in the class, every class member would be better off by opting out and pursuing an individual claim. *Ibid.* The argument is too clever by half: It ignores that there would be no *cy pres* remedy in the absence of sufficient class participation. Too many opt-outs would lead a court to reject the settlement. See *Hanlon* v. *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (requiring district courts to consider "the reaction of the class members to the proposed settlement" in evaluating a settlement proposal under predecessor to Rule 23(e), and finding opt-out rate of less than 0.1% corroborated fairness of settlement).

The argument is overbroad as well, as any injunctive relief that affects a defendant's general conduct—including the disclosures Google agreed to make here (JA94)—inevitably benefits nonmembers of a class as well as class members.

And petitioners' proposal has the practical effect of thwarting settlement (or substantially

overinflating the settlement value of) the low-value, large-class cases for which *cy pres* relief is most appropriate. Defendants would be forced to overpay to settle low-value class actions just to cover the claims administration costs. Indeed, administrative costs that reach several dollars per payment (see pp. 33-35, *supra*) could be many times the amount paid to class members as compensation.

We would welcome a legal rule barring class certification of *de minimis* claims when the per-class-member damages are less than the cost to pay them, particularly if the determination could be made, and the case dismissed, early in the litigation. And the same goes for an early evaluation of the merits and magnitude of injury as a factor in the superiority requirement at class certification. But effectively foreclosing settlements that assign low values to low-value claims makes no sense. It would undermine both judicial economy and economic efficiency to bar the door to settlement, and thus force litigation through class certification (if not to judgment) before these low-value cases could be resolved.

3. *Statutory damages, not* cy pres *settlements, provide incentives to bring low-value claims.*

Petitioners hypothesize that the availability of *cy pres* settlements "incentiviz[es] low-merit class actions" and "extortionate suits." Pet. Br. 35-36, 41. Statutory damages like the $1,000 per violation potentially available here under the Stored Communications Act, 18 U.S.C. 2707(c), provide strong incentives to bring the minimal injury actions that are candidates for a *cy pres* remedy. "What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple

mathematics: these suits multiply a minimum * * * statutory award * * * by the number of individuals in a nationwide or statewide class." Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009).

Although class members under statutes such as the SCA, the Telephone Consumer Protection Act (TCPA), and the Fair Credit Reporting Act (FCRA) often sustain minimal actual injuries, statutory damages multiplied by classes numbering in the millions can produce astronomical potential liability. See, *e.g.*, *Trans Union LLC* v. *FTC*, 536 U.S. 915, 915 (2002) (Kennedy, J., dissenting from denial of certiorari) ("[b]ecause the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion"); *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708, 710 (9th Cir. 2010) (reversing denial of class certification of FCRA claim seeking $290 million although the plaintiff "did not allege any actual harm," because the court found that outcome comported with legislative intent); *Beaudry* v. *TeleCheck Services, Inc.*, 579 F.3d 702, 703-04 (6th Cir. 2009) (FCRA, total liability in the billions); *Murray* v. *GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) (FCRA, $1.2 billion); *Golan* v. *Veritas Entertainment, LLC*, 2017 WL 3923162, at *4 (E.D. Mo. Sept. 7, 2017) (TCPA, $1.6 billion).

Cy pres settlements provide a necessary means to compromise risks of this magnitude when other factors—such as little actual injury, weak merits, unsettled law, legal hurdles to class certification—

combine to give the claims a low overall value per class member.

4. *Permitting* cy pres *settlements allows efficient resolution of low-value cases under the uncertainties of actual class-action practice.*

In maintaining that the availability of *cy pres* settlements incentivizes the filing of low-value class actions, petitioners seem to assume that defendants can count on defeating those actions at an early stage. See Pet. Br. 52-54.

That is not the world that class-action defendants inhabit. See Chamber of Commerce Br. 11-15 (collecting examples of courts circumventing commonality and predominance and presuming classwide injury). The uncertainties of lower court class certification jurisprudence may permit unascertainable classes asserting *de minimis* injury under individualized circumstances to progress to class certification and beyond. See *ibid.*; see also pp. 32-33, *supra*. And the aggregation of thousands or millions of individualized low-value claims, however erroneous, imposes settlement pressure even on defendants who, like Google, vigorously contest meritless lawsuits.

Although "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring), this Court's grant of certiorari in *Tyson Foods* reflected the circuits' differing approaches to the question "whether a class may be certified if it contains 'members who were not injured and have no legal right to any damages." *Id.* at 1049 (Court op.)

(quoting petition and noting that petitioner abandoned argument); see Chamber of Commerce Br. 6-11, 14-15.

Moreover, defendants cannot count on the courts of appeals to correct an erroneous class certification decision. Less than 25 percent of Rule 23(f) petitions are granted. Balser et al., *Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource*, Bureau of National Affairs (Mar. 16, 2017), https://bit.ly/2KvePFW. The grant rate in the Ninth Circuit is even lower—19%. Beisner et al., *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014), https://bit.ly/2ngUfQC.

Error and uncertainty in the class certification jurisprudence of the lower federal courts are not the only source of low-value, large-class lawsuits where the costs of making cash payments may far outweigh the payments themselves. The same issue would arise if a class asserted a sound legal theory and an economic injury—but one, say, of 40 cents per class member. If the class members had accounts with the defendant, payment might be inexpensive and thus feasible. But if the action arose in an industry where customers or users were unknown to the defendant, the cost of collecting and verifying identity and payment information, and making the payments, would exceed the actual injury many times over.

Under these circumstances, rather than curtailing low-value, large-class lawsuits, eliminating *cy pres* would drive up their settlement value, because settlement funds would have to be large enough to be distributable—especially in light of the administrative costs of directly distributing small amounts of money to a class whose members

could not be identified until the claims process. Without a *cy pres* option, a class-action defendant either would have to pay these increased amounts, or litigate through class certification, summary judgment, or both—at every turn spending vast amounts of attorneys' fees and risking an adverse legal ruling. Petitioners' scheme would shift more money to claims administrators and away from *any* benefit to the class.

On the other side of the ledger, no plaintiffs' lawyers will be discouraged by a legal rule impeding defendants from efficiently compromising these cases. The allure of a class-wide payday is too great; plaintiffs' counsel don't file lawsuits that they assess at the outset as unlikely to pay off. Driving up the costs of settlement will only give plaintiffs more leverage to extract excessive settlements.

5. *Both lower courts correctly found that it was not feasible to distribute the settlement fund in this case.*

Petitioners do not seriously dispute that it would be infeasible to distribute the concededly adequate settlement fund in this case to more than a tiny subset of the class members. Instead, they attack a caricature of the decision below, claiming that it adopted a new rule that "it is not considered 'feasible' to provide any compensation to class members when it would be infeasible to compensate *all of them*." Pet. Br. 49. But the Ninth Circuit said no such thing. It pointed out the "4 cents in recovery" per class member to highlight the "dramatic" "gap" between the settlement fund and the size of the class. Pet. App. 9. And it upheld the district court's finding "that the cost of verifying and 'sending out very small payments to millions of class members would exceed

the total monetary benefit obtained by the class.'" *Ibid.*[12]

Petitioners simply disagree with the factual finding of both lower courts that the $5.3 million settlement fund was not feasibly distributable, given the large and indeterminate class. This Court's "convention" is to "not overturn a finding of fact accepted by two lower courts." *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2544 (2015) (collecting cases).

In any event, petitioners do not meaningfully dispute the district court's finding that the identity of class members could not be readily determined: "This case is somewhat unique in that the size and nature of the class renders it nearly impossible to determine exactly who may qualify as a class member." JA98. In contrast with an employee or subscriber class, in which putative class members can be readily identified from a defendant's records, here it would not be possible for Google to direct payment to those who used Google Search.

Instead, members would have to identify themselves in a claims process, with notice and distribution costs that would inevitably swallow up the settlement fund, leaving little to nothing for class members.

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[12] The government similarly accuses the court below of doing "little more than dividing the available settlement funds by the total number of class members." Gov't Br. 28. As we explain, the Ninth Circuit in fact appropriately upheld the district court's considered finding that paying out the settlement fund was not feasible.

The district court expressly considered this point as well, finding that any claims process, which would necessarily involve "proofs of claim," "would impose a significant burden to distribute, review and then verify." JA95-96. The court further found that, given these circumstances, "the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class." JA96. And that imbalance of costs and benefits remains even if the "millions of class members" receiving payments amount to far less than the full 129 million. This finding is appropriate in light of the district court's experience and the cases noting high claims administration costs in similar circumstances. See pp. 33-35, *supra*.

Petitioners have offered no contrary evidence that would cast any doubt on the district court's findings. See Pet. App. 58. Instead, they assert that if the claims rate is tiny enough, then direct distribution to at least a handful of class members must be possible. But for the reasons discussed above (at 36-38), that cannot be the standard: If direct distributions work only by excluding the overwhelming majority of class members, then a *cy pres* alternative is better.

Finally, the district court's findings are especially appropriate in light of the absence of concrete injury and the questionable merit of the claims in this case. As the district court held, plaintiffs alleged no actual injury or risk of any such injury in the future. JA26-27. Specifically, plaintiffs could not allege any facts showing that they suffered (or imminently would suffer) any actual harm resulting from the inclusion of their search queries

as part of a referrer header sent to the destination webpages they selected from Google's search results page. They alleged neither economic loss nor other injury of any kind. And they did not allege that a single person was even identified, let alone linked with any private information, by any recipient of a referrer header or anyone else.

As the government points out (Br. 11-15), under current law, plaintiffs' Article III standing is doubtful at best. At the time of the settlement, this Court had not yet decided *Spokeo*, which abrogated Ninth Circuit precedent finding standing whenever a violation of a federal statute was alleged. The last district court opinion in this case (JA23-31) suggests that the case would have been dismissed had *Spokeo* been controlling law; our obligation to support the settlement constrains our ability to discuss this matter further. Most pertinent here is that parties should be able to compromise standing disputes when the answer is not clear under governing law at the time of the settlement. "The policy favoring compromise of disputed claims is clearest, perhaps, where a claim is surrendered at a time when it is uncertain whether it is valid." Restatement (Second) of Contracts § 74 cmt. b.

The district court further recognized the "significant and potentially case-ending weakness in the SCA claim brought about by the Ninth Circuit's decision in *Zynga Privacy Litigation*." Pet. App. 58-59.

Under these circumstances, petitioners' concerns about undercompensation of class members are hypothetical. Any distributable award to a minuscule percentage of the class would have been a windfall. And even if that windfall were authorized by

Congress' creation of a statutory damages remedy and the resulting potential exposure to defendants, petitioners' suggestion that the parties "share that windfall with the class" (Pet. Br. 41) obscures their actual proposal, which is to distribute the windfall solely to a tiny percentage of self- or arbitrarily selected class members and leave the rest of the class with no benefit at all. The lower courts were right to reject petitioners' proposition that Rule 23(e) demands that result.

B. Recipients of *cy pres* funds must commit in detail to use distributed funds in a way that will benefit the class or substantial portions of it.

Every court of appeals to consider the issue has required a nexus between *cy pres* recipients and the class members' asserted injury. See, *e.g.*, *In re Lupron Marketing & Sales Practices Litig.*, 677 F.3d 21, 31-34, 38 (1st Cir. 2012) (recipients' "interests reasonably approximate those being pursued by the class") (quotation marks omitted); *Pharmaceutical Price Litigation*, 588 F.3d at 33-36 (1st Cir.) (*cy pres* funds should be "used for a charitable purpose related to the class plaintiffs' injury"); *Baby Products*, 708 F.3d at 172-73 (3d Cir.) ("used for a purpose related to the class injury"); *Klier*, 658 F.3d at 471 (5th Cir.) (fund recipient must have "a sufficient nexus to the underlying substantive objectives of the class suit"); *Mirfasihi* v. *Fleet Mortgage Corp.*, 551 F.3d 682, 684 (7th Cir. 2008) (*cy pres* distribution in privacy class action went to group "concerned with consumer privacy"); *Powell*, 119 F.3d at 707 (8th Cir.) (approving *cy pres* distribution that was "tailored * * * to reflect the parties' original intention"). To ensure that class

members benefit from *cy pres* relief, this Court should require more than a mere nexus between the general focus of a *cy pres* recipient and the concerns raised in litigation. Rather, recipients should describe in detail what they will do with the class members' money, so that the district court can evaluate whether class members in fact will benefit.

As the court of appeals in this case observed, petitioners "do not dispute that the nexus requirement is satisfied here." Pet. App. 12. While petitioners falsely imply that both the district court and the court of appeals simply rubber-stamped the parties' selection of recipients (Pet. Br. 12-15)—a contention that the Ninth Circuit described as "unfair and untrue" (Pet. App. 12)—they cannot deny that two courts have now concluded that this distribution of *cy pres* funds will provide a benefit to the class members.

Indeed, this case provides a model for a procedure that ensures compliance with an enhanced nexus requirement for *cy pres* fund recipients that focuses on benefits to class members. Petitioners do not dispute that the recipients of the *cy pres* proceeds in this case are established educational or public interest organizations with a demonstrated track record of addressing Internet privacy issues like those that gave rise to the class claims. Nor do petitioners dispute that each recipient provided a detailed proposal for the use of the *cy pres* distribution—published on the class-notice website—that the district court reviewed and compared to "an

application for a grant." JA124; see also JA53-81; pp. 7-8, *supra*.[13]

As befits the nationwide scope of the class, the six *cy pres* recipients are geographically diverse. And they proposed to tackle Internet privacy issues—especially inadvertent disclosure by consumers—from a variety of directions. Compare, *e.g.*, JA57 (Carnegie Mellon technical proposal for the "design of specific interfaces and tools that improve privacy"), with JA68-71 (AARP proposal to improve online fraud-prevention for the elderly), and JA58-61 (Stanford proposal for (1) improving mobile privacy notices; (2) analyzing online privacy legislation; (3) improving a Cookie Clearinghouse; and (4) hosting educational events about online privacy practices).

When, as here, the procedure for selecting *cy pres* fund recipients is tailored to ensure that the funds will be used to address the concerns raised by the class claims, it is simply untrue that the settlement "fail[s] to redress class members' alleged injuries." Pet. Br. 33.[14] Although the class members do not

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[13] Petitioners suggest in passing that *cy pres* impermissibly "involve[s] judges in the legislative task of grant-making." Pet. Br. 17. But that argument makes no sense in the context of the settlement of private litigation: grant-making is a legislative task only when funded by taxpayers.

[14] Petitioners make far too much out of Judge Posner's colorful statement that "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else." Pet. Br. 33 (quoting *Mirfasihi* v. *Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004)). That is true only if the recipient or funded project is not linked to the class and the issues in the litigation. The nexus requirement reflects the consistent recognition that a well-tailored *cy pres* award provides an "indirect class benefit." *BankAmerica*, 775 F.3d at 1067 (quotation marks omitted); accord, *e.g.*, *Lupron*, 677 F.3d at 33 n.7.

receive a financial payment, they did not allege a financial injury. And the *cy pres* fund recipients have submitted detailed proposals for projects that will benefit class members by addressing the very concerns raised by the class claims and have a proven track record of work in the relevant field.

Cy pres awards can fund activities that provide clearly traceable benefits to the class, such as advocacy for public or private policy changes favorable to the class, or research that may lead to changes in policy or business practices.[15] And a *cy pres* award can fund consumer education or other services related to the allegations in the suit. The AARP's proposal to educate a million elderly Internet users about protecting their personal information and avoiding fraud (see JA68-71) would surely benefit more class members than a trivial payment to a fraction of that number.

If the distribution of individual payments to class members is infeasible, funding appropriately tailored services is the next best remedy and provides a benefit to the class. There is no dispute among the parties here that courts should reject *cy pres* settlements, like the examples petitioners highlight (Br. 33-35), that stray from this next best use.

Finally, because this procedure naturally directs funds to established institutions with proven track records, and requires those institutions to provide a

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[15] See, *e.g.*, *Vecchione* v. *Wohlgemuth*, 80 F.R.D. 32, 46 (E.D. Pa. 1978) (approving *cy pres* distribution to finance a "pilot program testing the feasibility of an agency system" (in lieu of a guardianship system) that could benefit the class of mentally ill patients by providing the basis for a policy shift at the state level).

detailed explanation of how they will use the funds, it avoids the Chief Justice's concerns about *cy pres* settlements in which the defendant agrees to create a new entity in which it "would play a major role" and that "necessarily lack[s] a proven track record of promoting the objectives behind the lawsuit." *Marek*, 571 U.S. at 1003.

C. Recipients of *cy pres* funds must be sufficiently independent from the parties, their counsel, and the court.

Just as class representatives and their counsel must not have conflicts of interest that interfere with their fiduciary responsibilities to absent class members, see, *e.g.*, *Kline* v. *Wolf*, 702 F.2d 400, 403 (2d Cir. 1983) (citing *Cohen*, 337 U.S. at 549-50), *cy pres* recipients must be sufficiently independent from the settling parties and the court that their delivery of services to benefit the class will not be compromised. See, *e.g.*, *Lupron*, 677 F.3d at 36-37 (citing ALI Principles, *supra*, § 3.07). Even under the approach advanced by petitioners, a "prior affiliation" between the selected institution and one of the parties, counsel, or the court must be so "significant" that it "would raise substantial questions about whether the selection of the recipient was made on the merits." Pet. Br. 55-56 (quoting ALI Principles, *supra*, § 3.07 cmt. b).

These concerns are largely addressed through a process—like that used here—that requires a detailed description of the recipient's intended use of the funds, favors institutions with a proven track record of addressing issues in the relevant field, and includes judicial review of the institutions selected by the parties.

In addition, the parties, not the judge, should select the *cy pres* recipients. See *Lupron*, 677 F.3d at 38. That easily resolves petitioners' hypothetical concerns over "the appearance or reality of judicial conflicts of interest," Pet. Br. 37, concerns that (like so many others) are not present here. Moreover, a contrary, judge-driven approach to *cy pres* selection risks running afoul of this Court's holding that district courts' authority under Rule 23(e) "to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." *Evans* v. *Jeff D.*, 475 U.S. 717, 726 (1986); cf. *Klier*, 658 F.3d at 475-46 & n.18 (rejecting district court's *sua sponte* redirection of settlement funds to *cy pres*).

Meaningful sources of potential conflicts should be disclosed to the district court—such as each recipient's disclosure here of Google's prior donations (Pet. App. 17)—but the relationship should not operate as a bar to finding that the settlement is "fair, adequate, and reasonable" if the selected institutions will use the *cy pres* funds in a way that provides a benefit to the class.

Although there is no reasonable appearance of a conflict here, the "appearance of conflict" standard that petitioners endorse (Br. 55-56) would affirmatively harm the interest of class members because it would arbitrarily divert funds away from some of the most qualified institutions.

1. That the attorneys or the parties have made donations to an organization in the past should not alone rule out consideration of that organization for the distribution of *cy pres* funds. If the organization submits a detailed explanation of how it will use the

funds to provide a benefit to the class and can demonstrate, to the parties and the court, that it is able to use awarded funds independently and follow through on its plan, then the interests of the class are protected. Established institutions, like those selected here, with a long track record of following through on proposals and remaining independent of donors are more likely to meet this standard.

Petitioners imagine (Br. 32-33) a worst-case scenario in which the defendant simply reallocates funds it had been providing to an organization for one purpose so that the organization now funds programs designed to benefit class members. But a fair, adequate, and reasonable settlement could still result if the institution demonstrates its ability to remain independent, and the newly funded programs provide a benefit to the class distinct from the party's prior donations. Petitioners imply that this possibility should be viewed with suspicion, if not outrage, because it is too easy on the defendant. But that is of no moment in a case seeking compensation where the only question is whether the settlement provides a satisfactory remedy for the class. Indeed, to the extent that a defendant might view such a reallocation of funds as an easy solution, this could only *increase* the amount of money that the defendant is willing to allocate to programs that advance the interest of class members. That is good for the class.

2. Similarly, for at least two reasons, petitioners are wrong to suggest that a *cy pres* settlement is suspect if it distributes funds to an organization that the defendant has supported or that has endorsed positions favorable to the defendant. Pet. Br. 31-33. First, established nonprofit organizations have

mechanisms for ensuring independence from donors and the parties, and district courts are capable of reviewing the policies and track records of proposed fund recipients. Second, no evidence supports petitioners' belief that an institution cannot advance the interests of the class unless it is ideologically opposed to the defendant.

In all events, petitioners' overblown rhetoric about donations to "preferred allies" (Pet. Br. 19) ignores the available evidence. As the court below detailed, "some of the recipient organizations have challenged Google's Internet privacy policies in the past." Pet. App. 16. Most notably, the Stanford Center for Internet and Society and the World Privacy Forum—two of the recipients here—pressed a Federal Trade Commission complaint against Google. See Pet. App. 16 & n.7 (collecting media accounts).

More generally, a settlement does not involve a determination that the defendant's conduct was improper. The measure of a fair, adequate, and reasonable *cy pres* settlement is not whether the fund recipient will oppose the defendant, but whether it will address the concerns raised by the class claims.

3. Finally, petitioners focus heavily on the *alma mater* relationship between some *cy pres* recipients and counsel for the parties. *E.g.*, Pet. Br. 1, 29, 54-56. But it should come as no surprise that the academic institutions at the forefront of Internet privacy issues also graduate in the aggregate thousands of attorneys each year, some of whom go on to practice class-action litigation. Petitioners "have never disputed that class counsel have no ongoing or recent relationships with their *alma maters* and have no

affiliations with the specific research centers." Pet. App. 19. Instead, they insist that "counsel's receipt of a degree from one of these schools taints the settlement"—a position the Ninth Circuit rightly concluded "can't be entertained with a straight face." *Ibid.* And while it appears to raise petitioners' pique that an attorney may derive personal satisfaction from a *cy pres* award to his or her *alma mater* (Pet. Br. 29-30), the attorney's feelings are irrelevant to the interests of the class if the class is benefited by institution's use of the funds. The inflexibility of petitioners' proposed rule would deprive class members of the services of organizations that are best suited to advance their interests.

D. Any concerns with misaligned incentives can be addressed by providing guidance on attorneys' fees.

A *cy pres* award that satisfies each of the three conditions above avoids the abuses petitioners lament. But if this Court remains concerned about misaligned incentives of class counsel, it should provide additional guidance to the lower courts about awards of attorneys' fees in class actions.[16] The analysis of attorneys' fees in class settlements required by new Rule 23(e)(2)(C)(iii) provides an opportunity for this Court to offer that guidance.

Petitioners' proposal to value *cy pres* "at zero" or at a "heavily discounted" rate (Pet. Br. 56-57), however, would materially impede settlements in the

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[16] Any reduction in an award of attorneys' fees will not affect Google's obligations under the settlement or the validity of the settlement itself. See, *e.g.*, Pet. App. 92-93. Nor would a change in fees affect the feasibility of distribution to class members; this is not a close case.

rare cases where *cy pres* relief is most appropriate. And it ignores the benefits to the class from a properly tailored *cy pres* award. Benefits are benefits, whether cash or noncash.

Moreover, the skewed incentives arising from class-action attorneys' fees awards are endemic to class actions generally. Any holding that constrains class-action attorneys' fees should apply to all class actions, not *cy pres* settlements in isolation.

Rather than carve out a separate scheme for attorneys' fees in *cy pres* cases, more meaningful reforms would tie fee awards to a lodestar value of the hourly services rendered rather than automatically awarding 25% to 40% of multi-million-dollar recoveries irrespective of the amount of legal work the plaintiffs' attorneys had performed. The hourly lodestar measure is the presumptive basis for attorneys' fees under the civil rights laws. See *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 546, 553-54, 556 (2010) ("reject[ing] the suggestion that it is appropriate to grant performance enhancements on the ground that departures from hourly billing are becoming more common"). And a lodestar-based fee, with any appropriate multiplier, would provide a sufficient incentive to bring meritorious cases. See *id.* at 552.

Limits of this kind are appropriate for the additional reason that, unlike individual plaintiffs, absent class members have no opportunity to negotiate a fee agreement giving up large portions of their potential benefit from the lawsuit. Awarding lodestar fees—with multipliers based on risk, difficulty, and results (both aggregate and per class member)—would produce more just fee awards while reducing incentives to file meritless class actions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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